

BEFORE THE
SURFACE TRANSPORTATION BOARD



228389

FINANCE DOCKET NO. 35438

**EIGHTEEN THIRTY GROUP, LLC – ACQUISITION EXEMPTION –
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

VERIFIED NOTICE OF EXEMPTION

228390

FINANCE DOCKET NO. 35437

**GEORGES CREEK RAILWAY, LLC – OPERATION EXEMPTION –
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

VERIFIED NOTICE OF EXEMPTION

228391

FINANCE DOCKET NO. 35436

**DUNCAN SMITH AND GERALD ALTIZER
CONTINUANCE-IN-CONTROL
EIGHTEEN THIRTY GROUP, LLC
AND GEORGES CREEK RAILWAY, LLC**

ENTERED
Office of Proceedings
DEC 8 - 2010
Part of
Public Record

VERIFIED NOTICE OF EXEMPTION

RIFFIN'S MOTION TO DISMISS FOR LACK OF JURISDICTION

1. Now comes James Riffin ("Riffin"), protestant in the above proceedings, who herewith files Riffin's Motion to Dismiss for Lack of Jurisdiction, and in support thereof states:

2. In *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order*, ICC Finance Docket No. 32248, Decided November 15, 1994, the Commission made the following statements:

“Our railroad jurisdiction: common carrier railroads only. Based on the Interstate Commerce Act and established case law, it can be argued that there are three kinds of railroads: common carrier railroads; private carrier railroads; and contract carrier railroads (often misleadingly referred to as ‘private’ contract carrier railroads). Footnote 10. [The definition of a contract carrier railroad.] The status of any particular railroad is determined by the nature of the transaction and / or service which that railroad holds itself out to provide. *Northern Plains [Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT]*, Finance Docket No. 32077 (ICC served Dec. 28, 1992).] ...

OUR RAILROAD JURISDICTION EXTENDS TO COMMON CARRIER RAILROADS ONLY. This limitation reflects the literal wording of Part I (the part governing railroads) of the pre-codification Interstate Commerce Act. [Bold and caps added.]

Section 1(1) (a) of Part I provided, *inter alia*:

The provisions of this part shall apply to common carriers engaged in — The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water [under certain circumstances].

Section 1(3)(a) of Part I provided, *inter alia*:

Wherever the word ‘carrier’ is used in this part it shall be held to mean ‘common carrier.’ The term ‘railroad’ as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

In 1978, the entire Interstate Commerce Act, including Part I thereof, was recodified as 49 U.S.C. Subtitle IV (sections 10101-11916). See Act of Oct. 17, 1978, Pub.L.No. 95-473, 92 Stat. 1337. The corresponding provisions of the recodified Act are section 10501(a)(1) (the commission ‘has jurisdiction over transportation – by rail carrier,’ etc.), section 10102(4) (‘common carrier’ means ... a rail carrier,’ etc.), section 10102(20) (‘rail carrier’ means a person providing railroad transportation for compensation’), and section 10102(21) (‘railroad’ includes – A bridge, [etc.], used by or in connection with a railroad; (B) the road used by a rail carrier and owned by it or operated under an agreement; and (C) a switch, spur, [etc.], used or necessary for transportation’).

The literal wording of the recodified provisions does not precisely reflect the pre-codification common carrier limitation of our railroad jurisdiction. The general rule,

however, which we have explicitly endorsed with reference to this very issue, is that the recodification was not intended to effect any substantive changes. See Act of Oct. 17, 1978, Pub.L.No. 95-473, section 3(a), 92 Stat. 1337, 1466. The *Northern Plains* decision (served December 28, 1992) is a recent reflection of our understanding that the pre-codification common carrier limitation survived the recodification. *Hanson* 18-19.

Our railroad jurisdiction: section 10901(a) railroad lines only. Section 10901(a) provides that a common carrier railroad may (1) construct an extension to any of its railroad lines, (2) construct an additional railroad line, (3) acquire or operate an extended or additional railroad line, or (4) provide transportation over, or by means of, an extended or additional railroad line, only if we find that the present or future public convenience and necessity (PC&N) require or permit the construction and / or acquisition, and operation, of the railroad line. Section 10903(a) provides that a common carrier railroad may (1) abandon any part of its railroad lines, or (2) discontinue the operation of all rail transportation over any part of its railroad lines, only if we find that the present or future PC&N require or permit the abandonment or discontinuance. Section 10505(a) provides, in pertinent part, that, under certain circumstances, we may exempt a common carrier railroad from the application of sections 10901(a) and 10903(a). Taken together, sections 10901(a), 10903(a), and 10505(a) provide, in essence, that a common carrier railroad may acquire, construct, or abandon a railroad line, or commence or discontinue operations thereover, only if we issue either a PC&N finding or an exemption.

Section 10901(a), by its terms, applies to every 'railroad line' constructed or operated over by any rail carrier providing transportation subject to our jurisdiction under subchapter I of chapter 105 of title 49 (sections 10501 to 10505). Section 10903(a), by its terms, applies to all 'railroad lines' that might be abandoned, or operation over which might be discontinued, by any such rail carrier. In fact however, sections 10901(a) and 10903(a) do not apply to all such railroad lines; two exemptions take many such lines out of the reach of sections 10901(a) and 10903(a). The section 10907(b)(1) spur exemption, on the one hand, removes from section 10901(a) / section 10903(a) jurisdiction certain lines that would otherwise be subject thereto. The private line exemption, on the other hand, amounts to a declaration that certain lines are not subject to section 10901(a) / section 10903(a) jurisdiction in the first place. *Id.* 20-21.

The private line exemption provides, in essence, that a 'private line' is not a 'railroad line' as that term is used in sections 10901(a) and 10903(1). There are, for present purposes, two kinds of private lines: those operated over only by private carrier railroads, and those operated over by common carrier railroads. The Escalante Spur falls in the first category. It is owned and operated over by Western Fuels, a private carrier railroad; no other railroad operates over it. The Baca - LRM Line, as shall be explained *infra*, falls in the second category. It is operated over by Santa Fe, a common carrier railroad, but it is not a 'railroad line' as that term is used in section 10901(a). Footnote 12. [The private line exemption can easily be obscured by misleading terminology. Many private lines (the Escalante Spur, for example), if they have any name at all, have

‘spur’ in the name. It should be noted, however, that a private line, although it may be called a spur, is not a section 10907(b)(1) spur, because it is not, in the first place, a section 10901(a) railroad line.] *Id.* 21.

3. On July 10, 2006, the Board granted CSX authority to consummate its abandonment of the Allegany Rail Line. “After abandonment authority has been lawfully consummated, the Board generally loses authority to reopen the abandonment proceeding. Footnote 8: *See Hayfield N. R.R. v. Chi. & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984); *S.R. Investors, Ltd. – Aban. – In Tuolumne County, Cal.*, AB 239-X, slip op. at 3 (ICC served Jan. 20, 1988).” *BNSF Railway Company – Petition for Declaratory Order*, STB Finance Docket No. 35164, Served December 2, 2010, slip op. at 4.

4. In AB-55 (Sub. No. 659X), on December 14, 2005, the Board granted Western Maryland Services LLC, authority to acquire and operate the Allegany Rail Line. On August 18, 2006, the Board granted Western Maryland Services LLC authority to substitute Riffin as the entity that would acquire and operate the Allegany Rail Line, thereby granting Riffin, in his individual capacity, permission to acquire CSX’s common carrier rights and obligations.

5. The Board has held that the authority to acquire and operate is permissive, “and does not mandate the acquisition, footnote 8,¹ or bestow any property rights on the acquiring entity ... , footnote 9.”² *Eighteen Thirty Group LLC -Acquisition Exemption – In Allegany County, MD*, STB Finance Docket No. 35438, Served November 17, 2010.

6. In *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245, Served September 15, 2009, slip op. at 6, the Board held that Riffin is not the rail carrier on the Allegany Rail Line because “Riffin does not appear to be capable of providing service over the Allegany line at this time as he does not own the line or have any other suitable legal interest in it that gives him the ability to exercise the authority the Board has granted.”

¹ Footnote 8: “*See, e.g., General Ry., d/b/a/ Iowa N.W.R.R. – Exemption for Acquis. of R.R. Line – in Osceola and Dickinson Counties, Fla.*, FD 34867, slip op. at 4 (STB served June 15, 2007).

² Footnote 9: “*See MVC Transp. LLC – Acquis. Exemption – P&LE Properties, Inc.*, FD 34462, slip op. at 6 (STB served Oct. 20, 2004).

7. Pursuant to the above STB rationale, Western Maryland Services LLC would not be a rail carrier on the Allegany Rail Line, since Western Maryland Services LLC has never acquired legal title to the Allegany Rail Line.

8. WMS LLC, has never sought, nor received, authority to acquire and operate the Allegany Rail Line. So WMS LLC cannot be a carrier on the Allegany Rail Line. Since the deed from CSX to WMS LLC has never been recorded, WMS LLC does not have legal title to the Allegany Rail Line, and thus, pursuant to the STB's FD 35245 rational, cannot be a rail carrier on the Allegany Rail Line.

9. Pursuant to the STB's September 15, 2009 decision in FD 35245, there has been no rail carrier on the Allegany Rail Line since July 10, 2006, the date CSX consummated its abandonment of the Allegany Rail Line.

10. Since the Board has held that since July 10, 2006, no common carrier railroad has been associated with the Allegany Rail Line, and since, pursuant to *Hanson Resources*, the STB's "Jurisdiction extends to common carrier railroads only," there being no common carrier railroad associated with the Allegany Rail Line, without a change in legal position by the STB, the STB would be judicially estopped from arguing that it has jurisdiction over the Allegany Rail Line.

11. Riffin's assertion that he is the common carrier on the Allegany Rail Line, and Riffin's assertion that the STB does have jurisdiction over the Allegany Rail Line, are incapable of vesting the STB with jurisdiction, since jurisdiction cannot be conferred [or withheld] by consent of the parties. *Highfield Water Co. v. Wash. Co. San.*, 295 Md. 410, 414.

12. If no one has a common carrier obligation with respect to the Allegany Rail Line, then the Line is a 'private line,' and as such is **not subject to the Board's jurisdiction**. *Hanson, op. cit.*

13. Unless the STB changes its position regarding the common carrier status of Riffin, the STB **must dismiss** the above proceedings for lack of jurisdiction.

14. On p.15 of the Comments, Mr. Heffner, counsel for Duncan Smith, Gerald Altizer, Georges Creek Railway LLC and the Eighteen Thirty Group LLC, argued that:

“Mr. Riffin’s attempts to transfer partial interests in the Line to these other parties appear to raise another issue worthy of board attention and enforcement. To the extent that Mr. Riffin has transferred an interest in a line of railroad without the purchaser’s *first* obtaining Board acquisition and operation authority or an exemption from that authority, these transactions are illegal and voidable. ... Petitioners urge the Board to require a reconveyance.”

15. Unless and until the STB declares that Riffin is a common carrier, the STB does not have jurisdiction over Riffin,³ nor does it have jurisdiction over the Allegany Rail Line. Without jurisdiction, the STB does not have the authority to order Riffin or his transferees to reconvey the property interests that Riffin conveyed.

16. Unless and until the STB declares that Riffin is a common carrier, the STB has no jurisdiction to enjoin Riffin or his transferees from removing the rails and track infrastructure, then selling those assets so that Riffin can obtain his 4% interest in those assets, and so that the transferees can obtain their 96% interest in those assets, in the form of cash.

17. The Board cannot have it both ways: For the Board to have jurisdiction over Riffin, or the Allegany Rail Line, the STB must declare that Riffin is the rail carrier on the Allegany Rail Line. *Hanson, op. cit.*, Slip Op. at 21. Until the Board reverses its FD 35245 decision, and finds that Riffin is a rail carrier subject to the Board’s jurisdiction, it does not have jurisdiction over Riffin or the Allegany Rail Line.

**RIFFIN IS A RAIL CARRIER,
FOR HE HAS ‘OPERATED’ ON THE ALLEGANY RAIL LINE AND
“HE IS PART OF THE TOTAL RAIL COMMON CARRIER SERVICE
THAT IS PUBLICLY OFFERED”**

³ See *Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut Dock Company*, Finance Docket No. 31363 (Sub. No. 1), 8 I.C.C. 2d 280, 283, (“*P&C Dock*”) wherein the Commission stated: “Our jurisdiction over rail carriers is limited to common carriers.”

18. In *P&C Dock*, the Commission stated:

“Whether P&C Dock is a rail carrier can be effectively determined through the application of two tests distilled from the foregoing cases: (1) does defendant conduct rail operations; and (2) does it ‘hold out’ that service to the public.” *Id.* 290.

“Our jurisdiction over rail carriers is limited to common carriers. Footnote 25: This is clear from the language of former §1(3)(a), 54 Stat. 899, prior to its recodification as §10102 without substantive change in 1978: [...]. What distinguishes common from private rail carriage is public access – ‘the right of the public to use the road’s facilities and to demand service of it.’ *Lone Star*, 380 F.2d at 648, *quoting The Tap Line Cases*, 234 U.S. 1, 24 (1913). Footnote 26: [More cites.] Accordingly, once it is determined that an entity conducts a rail operation, it is equally necessary to examine whether that service is publicly available. Footnote 27: [more cites].

“The second and third *Lone Star* considerations clearly indicate that as long as the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad, whether through common ownership or contract, is ‘deemed’ to hold itself out to the public. 380 F.2d at 647.

19. In *General Ry., d/b/a/ Iowa N.W.R.R. – Exemption for Acquis. of R.R. Line – in Osceola and Dickinson Counties, Fla.*, FD 34867, slip op. at 4 (STB served June 15, 2007), the STB held that General Railway was a rail carrier, and became a rail carrier, when it ‘operated’ on the line.

20. The STB, on p. 7 of its FD 35245 decision, attempted to distinguish *General Railway* and the other cases cited by Riffin, by asserting that “the noncarrier had become a rail carrier not merely because it had obtained Board authorization to operate, but because, in addition, it had exercised that authorization by actually providing service on the line.”

21. In *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 34997, Served May 2, 2008, the STB made the following statements:

“To come within the Board’s jurisdiction and thus be covered by the section 10501(b) preemption, an activity must constitute ‘transportation’ and must be performed by, or under the auspices of, a ‘rail carrier.’ *Id.* 5.

“[T]rack maintenance by a rail carrier within its right-of-way on a line that it operates is necessary to provide rail service over that rail line. **Repair of a line by adding ballast and ties, as petitioner states that he has done on the Allegany line,**

would constitute track maintenance and, therefore, would constitute part of rail transportation by rail carrier.” *Id.* 6.

22. The STB has acknowledged that Riffin has added “ballast and ties” to the Allegany Rail Line, and has acknowledged that this activity “would constitute track maintenance, and, therefore, would constitute part of rail transportation by rail carrier.”

23. In FD 34997, the STB acknowledged that Riffin “or an entity he controls acquired the Allegany line.” Slip op. at 3. “Riffin has a controlling ownership interest in WMS.” *Id.* p.3, footnote 9.

24. In FD 34997, the STB stated:

“In a subsequent filing, Riffin informed the Board that, although the initial pleadings did not identify it as such, ‘WMS’ was an acronym for the company Western Maryland Services, LLC, and that WMS, LLC, was not a legal entity at the time of the initial offer of financial assistance filing. **(CSX Transportation, Inc. (CSXT) does not dispute Riffin’s claim.)** According to a motion to compel filed by Riffin on January 14, 2008, Riffin acquired a 98% ownership interest in Western Maryland Services, LLC in or around February 2006, and, on May 26, 2006, Riffin chartered ‘WMS, LLC,’ as a legal entity in Maryland.” *Id.* p. 3, footnote 7. **Bold added.**

25. In *Hanson Resources*, at p. 25, the Commission made the following statements and cited with approval, the following from *New York Central Railroad Co. v. Southern Railway Co.*, 226 F.Supp. 463 (1964), aff’d 338 F.2d 667 (7th Cir.1964) (“***Southern Railway***”):

“The District Court noted, however, that operation by a carrier over a private track would come within section 1(18) [now 10901] if the carrier **either** provided a common carrier service over the private track **OR paid for the use or maintenance of the private track.** 226 F. Supp. at 474. [Bold and caps added.]

Authority of the Commission is required under paragraph 18 for a carrier to operate as a common carrier over private track, i.e., where the carrier holds itself out by tariff or otherwise to serve the public thereover.

It would also appear that such authority is required if the carrier, although serving only the owner of the mine or industry involved, undertakes to maintain or assist in maintaining the track over which it operates. This use of the carrier’s resources would bring the carrier within the language of paragraph 18

prohibiting it 'to operate any line of railroad, or extension thereof,' without Commission authorization.

If the 'carrier does not operate as a common carrier over the private track and does not use its funds to maintain the track or for the privilege of operating thereover, it is not operating any kind of road – branch, extension, spur or other – and does not fall within paragraph 18.' 226 F.Supp. at 473.”

26. In *Common Carrier Status of States*, 363 I.C.C. 132 (1980), the Commission held that if an entity acquires the track and land underlying a line of railroad, the entity also normally assumes the common carrier obligation to assure that rail service continues over the line. In *State of Maine*, 8 I.C.C.2d 835 (1991), the Commission noted an exception to this rule. In *State of Maine*, the Commission stated that the degree of **control** that the transferring rail carrier **retains**, determines whether the transferee will obtain the common carrier obligations associated with the rail line.

27. In the instant case, the transferring rail carrier, CSX, **has retained no control** over the Allegany Rail Line. Under the principles set out in *State of Maine*, the transferee would, by law, also obtain the common carrier obligations associated with the Allegany Rail Line.

28. In *Southern Pacific Transportation Company – Abandonment Exemption – Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 139X), the Commission held that LACTC obtained the common carrier obligations due to the amount of control that LACTC had over the line.

29. In FD 34997, the STB acknowledged that Riffin had total control over all of the entities that were involved (Riffin, Western Maryland Services LLC and WMS LLC).

30. In *Hanson Resources*, the Commission stated that prior to determining whether an entity would be a common carrier, the Commission had to first determine if the rail line at issue was subject to the Commission's jurisdiction. In determining whether a rail line was subject to the Commission's jurisdiction, the Commission stated that who constructed the rail line, and whether the rail line was subject to the Commission's jurisdiction prior to the transaction, were important.

31. In *Hanson*, the Commission determined that the rail line had been constructed by a non-carrier, and that prior to the transaction, the rail line was a private line, and thus was not

previously subject to the Commission's jurisdiction. Since *Hanson* did not propose to provide common carrier service, and since no other entity proposed to provide common carrier service on the rail line, the Commission held that the line would continue to be a private line not subject to the Commission's jurisdiction.

32. In the instant case, the Allegany Rail Line was constructed by a carrier (Cumberland and Pennsylvania Railroad), and prior to CSX's abandonment of the Line, was a line of railroad subject to the STB's jurisdiction. Riffin proposed to use the Line for common carrier purposes. In addition, since it was an Offer of Financial Assistance ("OFA") proceeding, prior to granting permission to acquire the Line, the STB had to have made a finding that the purpose in acquiring the Line was to 'continue rail service,' a necessary predicate to approving an OFA. See *Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ*, AB 167 (Sub-No. 1190X), Served May 17, 2010.

33. Since the STB decided that the purpose of the OFA was to 'continue rail service' on the Allegany Rail Line, any actions by the STB that would cause the discontinuance of rail service on the Allegany Rail Line would be contrary to the professed policy of the STB in OFA cases (preserving rail service).

34. In *Hanson Resources*, the Commission not only overtly adopted the ruling of the District Court in the *Southern Railway* case, but also quoted pertinent parts of the District Court's opinion, including the part where the District Court held:

“[A] carrier over a private track would come within section 1(18) [now 10901] if the carrier either provided a common carrier service over the private track OR paid for the use or maintenance of the private track.”

35. In the instant case, the STB has acknowledged that Riffin has repaired the “line by adding ballast and ties, as petitioner states that he has done on the Allegany line,” and has acknowledged that Riffin's adding ballast and ties “would constitute track maintenance and, therefore, would constitute part of rail transportation by rail carrier.”

36. Riffin has also repaired (at least six times) the grade crossing signals when they malfunctioned.

37. The STB has acknowledged that such maintenance by Riffin of the Allegany Rail Line, at Riffin's sole expense, constitutes 'operation' of the Allegany Rail Line. In addition, the *Southern Railway* court held that such maintenance of the Allegany Rail Line would constitute §10901 activity, and could only be done with authority from the STB.

38. In *City of Creede, Co – Petition for Declaratory Order*, FD No. 34376, Served May 3, 2005, the STB stated:

"Once rail operations have been authorized by the Board, the track remains a line of railroad subject to full agency regulation until the agency authorizes its abandonment." Op. at 8. Emphasis added.

"We are mindful that, at the present time, D&RGHF is not using any of the ROW [right of way] for rail service, as it is still in the process of rehabilitating the line. However, as the June 2004 Decision explains, the legal status of the Creede Branch under the statute is that of an active rail line with all the rights and obligations attendant to that designation. Op. 7. Emphasis added.

39. In *City of Creede*, the STB held that D&RGHF's maintenance of its rail line was sufficient to keep the line subject to the STB's jurisdiction, and to have D&RGHF remain a rail carrier.

THE STB CAN REOPEN AND CHANGE DECISIONS THAT IMPLICATE THE STB'S JURISDICTION

40. In *P&C Dock, op. cit.* at 288, the Commission stated:

"Under 49 U.S.C. §10327(g)(1), the Commission retains discretion to reopen and reconsider previous decisions and change a prior agency action, even those previously affirmed by the courts on judicial review, and a decision to reopen will be overturned only upon a 'showing of the clearest abuse of discretion.' [Citations omitted.] While the Commission must explain departures from precedent, *Greyhound Corp. v. I.C.C.*, 551 F.2d 414, 418 (D.C. Cir. 1972), it can always revisit its governing statute and reexamine matters, as here, that implicate its jurisdiction. *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983), *cert denied* 104 S.Ct. 2160 (1984).

CONCLUSION

41. The Board granted CSX authority to abandon its common carrier rights and obligations with respect to the Allegany Rail Line. On July 10, 2006, CSX abandoned its common carrier rights and obligations.

42. In an effort to preserve rail service on the Allegany Rail Line, the Board granted Riffin and Western Maryland Services LLC authority to acquire CSX's common carrier rights and obligations.

43. For the Allegany Rail Line to continue to be subject to the Board's jurisdiction, the rail line **must** have a common carrier associated with it.

44. At the moment, pursuant to the Board's September 15, 2009 decision in FD 35245, Riffin is not the rail carrier (because the Line was not deeded to Riffin), and Western Maryland Services LLC is not the rail carrier (because the Line was not deeded to Western Maryland Services LLC), and WMS LLC cannot be the rail carrier (since it does not have authority to be a rail carrier). Consequently, unless and until the STB holds that Riffin is the rail carrier on the Allegany Rail Line, **there is no common carrier rail carrier associated with the Allegany Rail Line. And without a rail carrier, the Allegany Rail Line is not subject to the STB's jurisdiction.**

45. And if the STB does not have jurisdiction over the Allegany Rail Line, the STB **cannot** grant the 1830 Group authority to acquire the Allegany Rail Line as a **'line of railroad,'** nor can the STB grant the Georges Creek Railway LLC authority to operate the Allegany Rail Line as a common carrier.

46. If the STB wants to retain jurisdiction over the Allegany Rail Line, the STB will have to make a determination that some entity is the rail carrier on the Line.

47. WMS LLC cannot be that entity, since WMS LLC has never sought, nor obtained authority to be a rail carrier.

48. Neither Riffin nor Western Maryland Services LLC have legal title to the Line, so, pursuant to the STB's decision in FD 35245, neither can be the rail carrier on the basis of ownership.

49. Western Maryland Services LLC has not 'operated' on the Line, nor has it provided any 'transportation by rail carrier' activities associated with the Line. Consequently, Western Maryland Services LLC cannot be the rail carrier.

50. Riffin has 'operated' on the Line by providing 'transportation by rail carrier' services on the Line: He has maintained the Line at his sole expense (by 'adding ballast and ties,' by repairing the grade crossing signals, and by removing track material away from the dangers posed by a washout on the Line).

51. Riffin has held himself out to the public as ready, willing and able to carry for hire, goods on the Allegany Rail Line. Until recently, Riffin had the full ability to provide common carrier service on the Line. (He had a blue-carded locomotive and a number of rail cars.)

52. The primary criteria for being a common carrier is a 'holding out,' (to provide indiscriminately rail service to all who seek rail service). Riffin has done that.

53. In *P&C Dock* and *Lone Star*, the Commission and courts have held that if the service offered "is part of the total rail common carrier service that is publicly offered," then the service is common carrier service. Riffin has offered to transport rail cars from / to Morrison, MD, the terminus of CSX's line, to / from Carlos, MD, and all points in between. Riffin's offer to transport rail cars on the Allegany Rail Line would be a "part of the total rail common carrier service that is publicly offered," would constitute a 'holding out,' and thus would be common carrier service.

54. The District Court in *Southern Railway*, and the Commission in *Hanson Resources*, have held that a 'holding out' coupled with "maintenance of the ... track" "paid for" by a carrier, is sufficient to make the carrier a common carrier.

55. WHEREFORE, Riffin would ask that the STB **Either** Dismiss the 1830 Group's Acquisition Exemption for lack of jurisdiction (if the STB does not have jurisdiction, the 1830 Group's Acquisition Exemption never legally became effective, so there is nothing to revoke); and


56. Dismiss Georges Creek Railway LLC's Operation Exemption for lack of jurisdiction;

57. Or hold that Riffin is the Rail Carrier on the Line; and

58. Hold that the STB continues to have jurisdiction over the Line; and

59. For such other and further relief as would be appropriate.

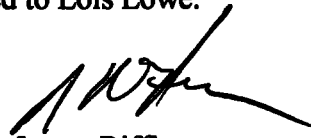
60. I affirm under the penalties of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



James Riffin
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th Day of December, 2010, a copy of the foregoing Motion to Dismiss was mailed via first class mail, postage prepaid, to: John Heffner, Ste 200, 1750 K Street NW, Washington, DC 20006, and was hand delivered to Lois Lowe.



James Riffin